No. 93-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED V. BOTTONE, SR., ANTHONY BOTTONE, and ALFRED BOTTONE, JR.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the action on August 5, 1993, which affirmed the District Court's denial of petitioners' motion to dismiss the Indictment on Double Jeopardy grounds.

QUESTION PRESENTED FOR REVIEW

Whether a fully executed settlement of civil forfeiture claims arising from a complaint filed four and one half months after the Indictment of petitioners on the same facts, constitutes prior punishment "in a separate proceeding" sufficient to bar further prosecution on Double Jeopardy grounds?

PARTIES TO THE PROCEEDING

Petitioners, Alfred V. Bottone, Sr., Anthony Bottone, and Alfred Bottone, Jr., were the only appellants below. The appellee was the United States of America.

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CITATION TO OPINION BELOW

The decision of the Court of Appeals is reported as United States v. Millan, 2 F.3d 17 (2nd Cir. 1993). The decision of the District Court is unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to **28 United States Code § 1254(1)**. The judgment of the Court of Appeals was entered on August 5, 1993. This petition is timely filed within ninety days thereafter.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution which reads:

> "...[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb..."

STATEMENT OF THE CASE

This case involves the denial of a motion to dismiss on Double Jeopardy grounds a Superceding Indictment (S9 91 CR 685 [SWK]), returned on October 5, 1992, which charges petitioners, Alfred V. Bottone, Sr., and his sons, Anthony Bottone and Alfred Bottone, Jr. ("the Bottones") and fifteen other defendants with Conspiracy to Distribute and to Possess With Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. The Indictment also contains a count seeking forfeiture from the Bottones and other defendants of property allegedly constituting and derived from the proceeds of their alleged federal narcotics violations and property used to facilitate those violations.

On February 23, 1993, the Bottones

filed a joint pretrial motion to dismiss the Superceding Indictment on Double Jeopardy grounds.

On February 25, 1993, the United States District Court in the Southern District of New York filed an Order denying the motion.

Timely Notices of Appeal were filed by the Bottones.

Prior to the commencement of jury selection, the Bottones moved in the District Court to stay the trial of the criminal case pending the disposition of the appeal. The motion to stay was denied on March 1, 1993, and the trial commenced on that day.

On March 3, 1993, the Bottones filed a Writ of Prohibition in the United States Court of Appeals for the Second Circuit seeking a stay of the trial.

On March 9, 1993, the Court of Appeals denied the Writ.

On April 16, 1993, the District Court declared a mistrial on grounds unrelated to the instant appeal and dismissed the jury. A retrial of the Indictment is presently scheduled for November 15, 1993.

On August 5, 1993, the Court of Appeals affirmed the District Court's denial of petitioners' motion to dismiss on Double Jeopardy grounds. It is this decision which petitioners seek to review.

BACKGROUND: THE INDICTMENT AND THE CIVIL FORFEITURE PROCEEDINGS

On July 30, 1991, the Honorable Kathleen Ann Roberts, United States Magistrate's Judge, issued a warrant to arrest the Bottones and 33 others based upon a criminal complaint alleging violations of the narcotics laws. Alfred V. Bottone, Sr., was arrested on August 1, 1991. His two sons surrendered voluntarily on August 6, 1991.

On August 2, 1991, the Honorable Robert P. Patterson, Jr., U.S.D.J., entered an ex parte restraining order preventing the transfer or dissipation of assets held by certain defendants, including the Bottones. An additional restraining order was entered on August 16, 1991, by the Honorable Lawrence M. McKenna, U.S.D.J. Together these restraining orders prevented the transfer or dissipation of all assets of the

Bottones.

On August 14, 1991, a Grand Jury returned an Indictment charging the Bottones and 33 others with Conspiracy to Distribute and to Possess With Intent to Distribute Heroin, in violation of Title 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. The Indictment also contained a count charging the Bottones and seven others with the criminal forfeiture of property constituting and derived from the proceeds of alleged narcotics violations and property allegedly used to facilitate those violations, pursuant to Title 21 U.S.C. § 853.[1]

On October 2, 1991, the District Court held a pretrial conference in the

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[1]Alfred V. Bottone, Sr., was subsequently charged in a Superceding Indictment (S9 91 CR 685 [SWK]) with Managing or Supervising a "Continuing Criminal Enterprise," pursuant to Title 21 U.S.C. § 848(a).

Bottones indicated their intent to move for a hearing in accordance with United States v. Monsanto, 924 F.2d 1186 (2nd Cir.) (en banc), cert. denied 112 S.Ct. 382 (1991), because their clients had insufficient funds to pay counsel's fees. Prior to entering a formal motion for a Monsanto hearing, the Bottone engaged in protracted negotiations with the Government which failed to result in the release of any assets.

On December 26, 1991, a civil forfeiture complaint was filed in the District Court against a business known as "Auction Cars" and the contents of certain bank accounts in the name of "Auction Cars" and "Alfred Bottone, Jr." Alfred Bottone, Jr., filed a verified claim and answer in the civil action. The civil case was assigned a civil index number and was referred to a different District Court Judge.

On July 28, 1992, counsel notified the District Court in the criminal case that the Bottones intended to file a motion seeking (1) the release of all assets of the Bottones restrained on the theory that they were "substitute assets," and (2) a **Monsanto** hearing concerning the remaining assets which were subject to restraint. As required by local rules, counsel sought a conference in order to narrow the issues prior to filing motion papers. In his letter, counsel alleged that none of the restrained assets were forfeitable under 21 U.S.C. § 853, and that the Bottones needed these assets to pay counsel fees and other costs of their defense to the criminal charges.

Negotiations continued between the Bottones and the Government, which resulted in a settlement agreement dated January 20, 1993.

Among the assets affected by the settlement was a bank account in the name of "Alfred Bottone, Jr.," which was funded with the proceeds of the settlement of a personal injury action from which Bottone, Jr., recovered $328,880.13. The funds were later used to purchase automobiles for "Auction Cars." At the time of the seizure, the account contained proceeds of the sales of these cars, as well as proceeds of the personal injury settlement. Also affected by the settlement was the title to the real property located at Lot 348 in Thornhurst Country Club Estates, Lakawana, Pennsylvania, which was purchased by Alfred V. Bottone, Sr., more than twelve years before the commencement of the conspiracy alleged in the Indictment. In all, petitioners agreed to forfeit to the Government $236,804.48 in bank deposits, two parcels of real

estate, and two business interests, and also to renounce any claim to other properties.

In exchange, the Government agreed to release from bank accounts in the name of "Alfred Bottone, Jr.," the sum of $101,000.00, and returned to the Bottones other assets which permitted them to pay attorneys fees and other costs of their defense. Pursuant to stipulation, the civil forfeiture action was dismissed.

THE MOTION TO DISMISS THE INDICTMENT

In their motion to dismiss the Indictment, the Bottones made the following contentions: (1) that they had fully performed in accordance with the settlement agreement by divesting themselves of all of the properties which they were obligated to release to the Government; (2) that none of the assets originally seized were the proceeds,

fruits, or instrumentalities of narcotics activity; (3) that they were returned only enough property to pay attorney's fees and related costs of the defense; and (4) that all of their remaining assets have been taken from them by the Government, leaving them destitute.

The Bottones argued that the settlement of the civil action and related claims constituted punishment within the meaning of the Double Jeopardy Clause and that they could not be further prosecuted in the criminal case.

The District Court denied the motion without a hearing, finding that (1) the civil and criminal actions constituted a single proceeding, (2) the value of the seized property was not "overwhelmingly disproportionate" to the value of the illegal narcotics giving rise to the criminal indictment, and (3) the defendants were estopped from making this

assertion because they voluntarily entered into the stipulation.

The Court of Appeals affirmed the lower court's decision solely on the ground that the civil forfeiture action and the criminal prosecution were part of a "single coordinated prosecution." Because of this finding, the Court of Appeals did not reach the other issues raised in the District Court's decision.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING WHAT CONSTITUTES A "SEPARATE PROCEEDING" FOR PURPOSES OF DETERMINING WHETHER FORFEITURE PROCEEDINGS AND A CRIMINAL PROSECUTION DIRECTED AGAINST THE SAME DEFENDANT VIOLATE THE PROSCRIPTION AGAINST MULTIPLE PUNISHMENTS **CONTAINED IN THE DOUBLE JEOPARDY CLAUSE.**

THE DECISION BELOW APPEARS TO CONFLICT WITH PRECEDENT FROM THIS COURT AND DECISIONS OF OTHER CIRCUITS DEFINING THE TERM "SEPARATE PROCEEDINGS" FOR DOUBLE JEOPARDY PURPOSES.

The Applicable Law of Double Jeopardy

In United States v. Halper, 490 U.S. 435 (1989), this Court held that a civil penalty for filing a false claim with the Government, which is imposed after a criminal conviction for the same act, constituted a punishment in violation of the Double Jeopardy clause when the amount of the civil fine bore no rational relation to the Government's loss.

The holding in Halper has been extended to apply whether the civil

penalty follows or, as here, precedes the criminal conviction. United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), cert. denied 113 S.Ct. 123 (1992); United States v. Mayer, 897 F.2d 1126 (11th Cir.), cert. denied 111 S.Ct. 178 (1990); see also, United States v. Park, 947 F.2d 130 (5th Cir. 1991).

The United States Supreme Court has recently reaffirmed the notion that a civil penalty may constitute a "punishment" within the meaning of the United States Constitution -- in the context of the Eighth Amendment's prohibitions against cruel and unusual punishment and excessive fines. See, Austin v. United States, ___U.S.___, 61 U.S.L.W. 4835 (1993) (in rem forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) is subject to the limitations of the Excessive Fines clause of the Eighth Amendment); Alexander v. United States,

__U.S.__, 61 U.S.L.W. 4796 (1993) (in personam forfeiture under 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D) is likewise subject to the restrictions of the Eighth Amendment).

Moreover, in United States v. Certain Real Property and Premises at 38 Whaler's Cove Drive, 954 F.2d 29, 35-7 (2nd Cir.), cert. denied 113 S.Ct. 55 (1992), the Second Circuit held that the Halper Double Jeopardy analysis applies to in rem civil forfeitures, rejecting the argument that because the action is, in theory, against the property, Double Jeopardy analysis has no place.

Application of the principles underlying these decisions to the indisputable facts of this case precludes further criminal prosecution on Double Jeopardy grounds. In the present case, (1) the settlement of civil forfeiture claims constitutes a "monetary

punishment" as in **Austin** and **Alexander**, and (2) the Government is seeking to prosecute petitioners in a criminal Indictment based upon the same facts.

The Court of Appeals avoided this conclusion by finding that the civil forfeiture action and the criminal prosecution herein were part of a "single coordinated prosecution." Thus, the Second Circuit sought to distinguish the present matter from the strict holding in **Halper**, which applied where a completed criminal prosecution precluded the imposition of civil penalties in a "separate proceeding." **See**, **Id**. at 450-1; **see also**, **Ohio v. Johnson**, 467 U.S. 493, 499-500 (1984); **Missouri v. Hunter**, 459 U.S. 359, 368-9 (1983). However, the Second Circuit's decision labeling this a "single coordinated prosecution" conflicts with decisions by both this Court and other Circuits. Moreover, it

defies reality.

What Constitutes "Separate Proceedings" for Double Jeopardy Purposes

The issue of what constitutes "separate proceedings" for Double Jeopardy purposes is obviously an important question of constitutional law.

It is an issue particularly in need of resolution because of the Government's increasing use of forfeiture proceedings in its war on crime. See, Pratt & Peterson, Civil Forfeiture in the Second Circuit, 65 St. John's Law Review 653 (1991).

In prior cases interpreting the meaning of "separate proceedings" for the purpose of giving effect to the proscription against successive prosecutions based on the same facts, contained in the Double Jeopardy clause, the United States Supreme Court has taken an expansive view of what

constitutes "separate proceedings. Thus, the Supreme Court has held that where a court imposes sentence in a criminal case by fining the defendant, and the fine has been paid, it cannot then modify the judgment to impose a sentence of imprisonment under the same statute. See, In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. 163 (1873).

The Second Circuit's limited view of what constitutes "separate proceedings" also conflicts with decisions in other Circuits.

For example, in United States v. Sanchez-Escareno, supra, the defendant was captured by United States Customs Officials attempting to smuggle 29 pounds of marijuana into the United States from Mexico. The defendant was immediately arrested (thereby initiating a criminal prosecution), and was simultaneously advised that the Customs Service was

seizing his car and that he was subject to a civil penalty under 19 U.S.C. § 1497 for importation of undeclared articles. On the same day, the defendant executed forms which reflected a civil assessment against the property seized by the Government. The defendant then sought to dismiss the criminal charges, claiming that further prosecution would violate the proscription against Double Jeopardy. On appeal, the Fifth Circuit held that the defendants' mere execution of notes, without an actual payment of the civil fine, did not constitute a punishment for Double Jeopardy purposes. However, the Court had no problem construing the civil and criminal actions as separate proceedings, finding that if:

> "...the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy."

Id. at 203.

Similarly, in United States v. Park, supra, on March 12, 1988, Customs agents seized $48,000 in undeclared currency from defendant, who was about to embark on a flight from the Dallas/Fort Worth Airport to Korea. The defendant was detained for questioning and then released while the matter was referred to the United States Attorney's Office for prosecution. Subsequently, on March 16, 1988, a Notice of Assessment was served on the defendant. On April 15, 1988, the defendant's attorney petitioned for mitigation of the forfeiture and requested a stay of civil proceedings pending the outcome of the defendant's criminal case. On March 8, 1989, a federal Grand Jury in the Northern District of Texas indicted the defendant, and he was later convicted on two counts relating to the failure to

file an outbound currency report and making a false statement to a Customs officer. The defendant appealed his conviction on Double Jeopardy grounds.

While the Circuit Court held that the Double Jeopardy clause did not apply because no final administrative action or other adjudication of civil liability occurred prior to defendant's criminal conviction, the Court did not suggest that the civil forfeiture and criminal prosecution, which began on the same day, failed to meet the requirement in Halper that the civil punishment and the criminal prosecution constitute "separate proceedings."

Finally, the Second Circuit's holding fails to comport with the realities of practice in the federal and state courts. As the Court of Appeals recognized, the complaint initiating the civil forfeiture proceeding was filed on

December 26, 1991, approximately four and one half months after the return the initial Indictment against petitioners, and approximately ten months before the return of the final Superceding Indictment. The forfeiture action had its own civil case number; was assigned to a different District Court judge; and, was subject to a different burden of proof.

Accordingly, precedent by the Supreme Court and other Circuits should be followed in defining a criminal prosecution and a forfeiture action such as this as "separate proceedings" for Double Jeopardy purposes.

CONCLUSION

For all of the reasons set forth herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
November 1, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Appellee,

v.

Eric MILLAN, Defendant,

Alfred V. Bottone, Sr., also known as Fat Al, also known as Valentino A. Bottone, Anthony Bottone, and Alfred Bottone, also known as Alfie, Defendants-Appellants.

Nos. 1637 to 1639, Dockets 93-1129, 93-1133 and 93-1134.

United States Court of Appeals,
Second Circuit.

Argued June 22, 1993.

Decided Aug. 5, 1993.

Motion to dismiss indictment on double jeopardy grounds was denied by the United States District Court for the Southern District of New York, Shirley Wohl Kram, J., and defendants appealed. The Court of Appeals, Altimari, Circuit Judge, held that civil forfeiture action was part of single coordinated prosecution of defendants, and thus settlement did not

bar, on double jeopardy grounds, criminal prosecution for underlying drug offenses.

Affirmed.

1. Double Jeopardy 25

Civil forfeiture action was part of single coordinated prosecution of defendants and thus its settlement did not bar criminal prosecution for underlying drug offenses, on double jeopardy grounds, though civil and criminal actions were filed separately with their own docket numbers, where civil and arrest warrants were issued on the same day, by same judge, based on same affidavit, stipulation of settlement involved not only seized properties in civil suit but also properties named in criminal indictment, civil complaint incorporated criminal indictment, and defendants were

aware of criminal charges against them when they entered into the stipulation. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy 5.1

Congress may impose multiple punishments for single crime without violating double jeopardy restrictions. U.S.C.A. Const. Amend. 5.

Maurice H. Sercarz, New York City (Gerald Labush, David Breitbart, of counsel), for defendants-appellants.

Dietrich L. Snell, Asst. U.S. Atty., S.D.N.Y., New York City (Roger S. Hayes, U.S. Atty., Paul G. Gardephe, Asst. U.S. Atty., of counsel), for appellee.

Before: NEWMAN, Chief Judge, VAN GRAAFEILAND, and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Defendants-appellants Alfred V. Bottone, Sr., Anthony Bottone, and Alfred Bottone, Jr. ("the Bottones") appeal from an order entered in the United States District Court for the Southern District of New York (Shirley Wohl Kram, Judge), denying their motion to dismiss the government's indictment against them. The indictment, initially filed on August 14, 1991, charges the Bottones with, inter alia, participation in a narcotics distribution conspiracy involving "massive amounts of heroin," in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846 (1988).

Subsequently, on December 26, 1991, the government also filed an in rem civil forfeiture suit against certain properties and bank accounts later claimed by Alfred

Bottone, Jr. in connection with the alleged criminal narcotics activity, pursuant to 21 U.S.C. § 881 (1988). On January 20, 1993, the Bottones entered into an agreement with the government ("the Stipulation") pursuant to which the government relinquished its claim to $101,000 in several bank accounts and various other assets. These funds were relinquished to enable the Bottones to pay attorneys' fees arising from their defense of the civil and criminal actions. In return, the Bottones relinquished any claim to $240,000 in cash plus other properties seized by the government. In accord with the Stipulation, the in rem civil suit was subsequently dismissed.

On February 23, 1993, the Bottones moved to dismiss the criminal indictment against them. According to the Bottones,

the government was barred from prosecuting them by the Double Jeopardy Clause of the Fifth Amendment, because the Stipulation acted as prior punishment for the same crimes. The district court denied the motion, finding, inter alia, that the civil and criminal prosecutions constituted a single proceeding, and, therefore that the prohibitions of the Double Jeopardy Clause had not been implicated.

On appeal, the Bottones again assert that the Stipulation should be considered prior punishment under the Double Jeopardy Clause, and thus a conviction following the government's criminal prosecution would constitute a second punishment for the same offense.

For reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

This case arises from a Drug Enforcement Administration ("DEA") investigation of an alleged large scale organization dedicated to the distribution of heroin, whose members purportedly include the Bottones. On July 30, 1991, arrest warrants were issued by United States Magistrate Judge Kathleen Anne Roberts for over forty individuals, including the Bottones, based on the affidavit of Special Agent Dongilli of the DEA. Also based on this affidavit, Magistrate Judge Roberts issued seizure warrants on the same day for various assets alleged as facilitators of or proceeds from the illegal activity, pursuant to the federal civil forfeiture statute. See 21 U.S.C. § 881 (1988). Among the assets seized under the civil

warrants was the "Auction Cars" used car business, including all the vehicles and bank accounts associated with Auction Cars.

On August 14, 1991, the Bottones were named in an initial grand jury indictment, which accused them with, inter alia, participation in a conspiracy to distribute "massive amounts of heroin," in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846 (1988). The indictment also included a criminal forfeiture count for properties derived as the proceeds from, or used to facilitate drug violations, pursuant to 21 U.S.C. §§ 853(a)(1) and (a)(2). Shortly thereafter, on August 16, 1993, the United States District Court issued a post-indictment restraining order, pursuant to 21 U.S.C. § 853(e)(1)(A), preventing the Bottones from

transferring or dissipating the properties named in the criminal forfeiture count.

On October 2, 1991, a pretrial conference was held at which the Bottones claimed that they lacked the funds needed to pay their attorneys' fees. However, instead of filing a motion for a pretrial hearing to obtain the release of funds for attorneys' fees under this Court's ruling in United States v. Monsanto, 924 F.2d 1186 (2d Cir.) (in banc), cert. denied, __ U.S. __, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991), the Bottones and the government began settlement negotiations concerning the assets involved in both the August 1 civil seizures and the August 16 criminal restraining order.

In the meantime, Alfred Bottone, Jr. filed an administrative claim challenging the government's seizure of Auction Cars.

In response, on December 26, 1991, the government filed an *in rem* civil forfeiture complaint against Auction Cars and its associated assets. In its complaint, the government incorporated the indictment by reference and exhibit. Only Alfred Bottone, Jr. filed an answer to this complaint, asserting his ownership of the defendant-*in-rem* properties as well as various defenses to the government's claims.

On October 5, 1992, the grand jury issued a superseding indictment, which included a count alleging that the Bottones and their co-defendants had obtained property in excess of $100 million from the charged narcotics violations. The indictment also charged the Bottones and their co-defendants with joint and several liability for the

forfeiture of such property, pursuant to 21 U.S.C. § 853(a). Finally, the indictment disclosed the government's intention to satisfy any forfeiture liability with "substitute property" of the Bottones, even though said property was not directly implicated in the narcotics conspiracy, pursuant to 21 U.S.C. § 853(p) (1988).

On January 20, 1993, the Bottones entered into the Stipulation, pursuant to which the government agreed to release $101,000 in cash as well as various other real and personal assets to the Bottones in order to enable them to pay attorneys' fees. In return for these concessions, the Bottones agreed to forfeit certain other properties—including $236,804.48 in bank deposits, two parcels of real estate, and two business interests—to the

government, and also renounce any claim associated with certain other properties. Pursuant to the Stipulation, the civil suit was dismissed.

On February 23, 1993, before the start of the criminal trial, the Bottones filed a motion to dismiss the superseding indictment on double jeopardy grounds. Relying on the Supreme Court's decision in United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the Bottones claimed that the settlement agreement constituted "punishment" within the meaning of the Double Jeopardy Clause. The district court denied the motion to dismiss and found that Halper did not apply in this case because: (1) the civil and criminal prosecutions constituted a single proceeding; (2) the value of the seized property was not "overwhelmingly

disproportionate" to the value of the illegal narcotics giving rise to the criminal indictment; and (3) the defendants were estopped from making this assertion because they voluntarily entered into the Stipulation. The Bottones subsequently filed notices of appeal and moved for a stay of the trial pending appellate review. The district court denied the stay, and proceeded to empanel a jury. The Bottones then petitioned this Court for a Writ of Prohibition to stay further trial proceedings. On March 9, 1993, we denied this petition.

The Bottones now appeal on double jeopardy grounds from the underlying order denying the motion for dismissal.

DISCUSSION

[1] On appeal, the Bottones claim that the settlement of the civil action acted as punishment under the double jeopardy clause, thereby precluding the government's criminal prosecution for the same offenses. In effect, the Bottones are contending that the district court erred in failing to require the government to justify its seizures as not being "overwhelmingly disproportionate." We need not reach this question, however, because we conclude that the government has employed a single proceeding to prosecute the Bottones, and, therefore, the proscription of the Double Jeopardy Clause does not apply.

The seminal case in this realm of double jeopardy jurisprudence is United States v. Halper, 490 U.S. 435, 109 S.Ct.

1892, 104 L.Ed.2d 487 (1989). In Halper, the Court analyzed the application of a $130,000 civil fine to a $585 fraud committed against the government, and held that such an "overwhelmingly disproportionate" assessment acted as punishment within the meaning of the Double Jeopardy Clause. See id. at 448-49, 109 S.Ct. at 1901-02. This Court has held that Halper applies to civil forfeiture proceedings under 21 U.S.C. § 881. See United States v. Certain Real Properties and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29, 35 (2d Cir.), cert. denied, __ U.S. __, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992).

[2] In Halper the Supreme Court noted that multiple punishments arising out of one proceeding fall outside the scope of

its analysis concerning the proportionality of a civil sanction. See Halper, 490 U.S. at 450, 109 S.Ct. at 1903 ("[T]he decision [does not] prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."). Indeed, it is well established that Congress may impose multiple punishments for a single crime without violating the Constitution's double jeopardy restrictions. See, e.g., United States v. Woodward, 469 U.S. 105, 105 S.Ct. 611, 83 L.Ed.2d 518 (1985) (per curiam) (holding that Congress intended multiple punishment for actions involving both false statements to a government official and concealment of currency); Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983) ("Where ... a legislature specifically

authorized cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct ... the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."). It is also clear that a single prosecution seeking multiple punishments may be brought without double jeopardy implications. See Ohio v. Johnson, 467 U.S. 493, 500, 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425 (1984) ("[T]he [Double Jeopardy] Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution."). Thus, the threshold issue before us is whether the civil forfeiture suit, which resulted in the aforementioned Stipulation, was part of a single, coordinated prosecution of persons

involved in alleged criminal activity. We conclude that it was.

In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the Stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the Bottones were aware of the criminal charges against them when they entered into the Stipulation. Given these circumstances, we reach the conclusion that the civil and criminal actions were but different prongs of a single

prosecution of the Bottones by the government.

The Bottones point out, correctly, that the civil and criminal actions were filed separately with their own docket numbers. This factor, however, is not dispositive in determining whether the government is employing a single proceeding in its prosecution of a defendant. Civil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated. In the instant case we note that the actions were both started on July 30, 1991, when arrest and seizure warrants were issued based on the same affidavit by

a DEA agent. These warrants were issued as part of a coordinated effort to put an end to an extensive narcotics conspiracy. We therefore must conclude that the civil forfeiture suit and the criminal prosecution at issue here constituted a single prosecution against the Bottones.

In so holding we are cognizant that one of the Halper Court's concerns was that the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action. See Halper, 490 U.S. at 451 n. 10, 109 S.Ct. at 1903 n. 10. That problem is obviously not present in the instant case, because the civil and criminal actions were contemporaneous, and not consecutive. Indeed, the record before us gives ample indication that it was clear to all parties that the

government intended to pursue all available civil and criminal remedies, regardless of the individual outcome of any of these claims.

Civil forfeiture was intended by Congress to be a powerful weapon in what has become a bitter and protracted war on drugs. See United States v. 141st Street Corp. by Hersh, 911 F.2d 870, 878 (2d Cir.1990) (noting statute's legislative history), cert. denied, 498 U.S. 1109, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991). While we have repeatedly cautioned the government that the constitution must never be made a casualty of this war, see, e.g., United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir.1992), where, as here, constitutional prohibitions are not implicated, the government is not precluded from employing the full range of

statutorily authorized penalties at its disposal. See United States v. Halper, 490 U.S. at 450, 109 S.Ct. at 1903.

CONCLUSION

Based on the foregoing, the order of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	x	S9 91 Cr. 685 (SWK)
-against-	x	
ALFRED BOTTONE, et al.,	x	**ORDER**
Defendants.	x	

SHIRLEY WOHL KRAM, U.S.D.J.

This criminal case involves a twenty-five count indictment charging thirty-six defendants with various crimes, including, engaging in an extensive heroin trafficking conspiracy, engaging in a continuing criminal enterprise, substantive narcotics trafficking offenses, and the unlawful use and possession of firearms. Currently pending before this Court is a joint motion filed by defendants Alfred V. Bottone, Alfred

Bottone, Jr., and Anthony Bottone (collectively, "the Bottones"), for an order dismissing the indictment on the grounds of double jeopardy. The Government opposed this motion. For the reasons set forth below, the joint motion is denied.

Background

In August 1991, the Bottones were arrested and, along with thirty-three other defendants, charged with conspiracy to distribute and possess with intent to distribute heroin; criminal forfeiture of property constituting and derived from the proceeds of their narcotics violations; and conducting a continuing criminal enterprise. On August 2, and 16, 1991, restraining orders were entered preventing the transfer and dissipation of certain assets held by the defendants. On January

20, 1993, after a protracted series of negotiations with the Government, the Bottones agreed to forfeit certain properties and forego any claim to other properties, in exchange for the release of $101,000 in cash and certain other assets in order to pay their attorneys' fees in this criminal case. The Government also agreed to dismiss a civil complaint filed on December 16, 1991, against a business known as "Auction Cars." See Stipulation and Order, dated January 20, 1993, attached to the Affidavit of Maurice Sercacz, as Exhibit "A".

Defendants now move for an order dismissing the indictment on the grounds of double jeopardy. Relying on the Supreme Court case of United States v. Halper, 490 U.S. 435 (1989), defendants argue that the civil forfeiture of their

property, obtained by the Government pursuant to the January 20, 1993 Stipulation and Order, constitutes punishment. Defendants also claim that the assets seized by the Government were not proceeds from the crimes alleged in the indictment, and, in fact, with one exception (the mortgage payments on Alfred V. Bottone's home) were acquired years before the conspiracy allegedly began. Defendants further allege that their roles in the conspiracy were very limited. Thus, according to the defendants, the civil forfeiture, unrelated to the charged crimes and disproportionate to the defendants' roles in the conspiracy, clearly constitutes punishment, sufficient, on double jeopardy grounds, to prevent further criminal prosecution.

Discussion

In United States v. Halper, 490 U.S. 435 (1989), the Supreme Court held that following a criminal conviction, the government may not impose additional civil sanctions based on the same conduct, if the proposed civil sanctions bear no rational relationship to compensating the Government for its damages and/or expenses and would merely constitute an unconstitutional second attempt to punish criminally. Id. at 449. The Supreme Court further held, however, that when the chief purpose of the civil penalty is to provide restitution to the Government for its losses, including the costs of investigation and prosecution, the penalty is merely remedial and not a second punishment for double jeopardy purposes. Id. at 441-46. The Supreme Court also

stressed that this "rule is for the rare case ... where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Id. at 449 (e.g., subjecting defendant Halper to a $130,000 penalty for a $585 fraud). Thus, the Halper holding left intact the Government's ability to (1) seek a punitive civil penalty against a defendant who has not been previously punished for the same conduct, and (2) seek and obtain "both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Id. at 449.

Applying Halper, the Second Circuit in United States v. Certain Real Property and Premises Know as 38 Whalers Cove Drive, Babylon, N.Y., 954 F.2d 29 (2d Cir.),

cert. denied sub nom., Levin v. United States, 113 S. Ct. 55 (1992) found that a civil forfeiture of a $145,000 condominium, used in connection with a $250 drug transaction, could constitute punishment if the forfeiture is "overwhelmingly disproportionate to the value of the offense" and serves no "articulated, legitimate civil purposes." Id. at 35. If the forfeiture serves a legitimate civil purpose, however, including (1) removing the instrumentalities of crime from general circulation and preventing further illicit use; (2) impeding the success of the criminal enterprise by eliminating its resources and instrumentalities; or (3) compensating the Government's costs of investigation and damages, the forfeiture is not punitive and will not invoke double jeopardy concerns. Id. at 35-36.

In the case at hand, the Court finds that the Bottones clearly have not been subjected to double jeopardy. First, as the Government indicates, the criminal case against the defendants and the simultaneous civil proceedings against their property constitute a single, coordinated prosecution for alleged violations of the federal narcotics laws. See United States v. Halper, 490 U.S. at 449 (double jeopardy clause not implicated where only one proceeding involved); Cf. United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive Babylon, N.Y., 954 F.2d 29 (2d Cir. 1992) (double jeopardy analysis applicable as federal government sought to obtain forfeiture following wholly separate criminal proceeding in state court). Indeed, the original and subsequent

superseding indictments have all contained forfeiture counts against the Bottones.

Second, the Bottones have not satisfied the Court that the value of the seized property is "overwhelmingly disproportionate" to the value of the controlled substances involved in this case. See United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, N.Y., 954 F.2d at 36. In fact, the Court finds no evidence that the total sum of the assets forfeited (namely, $236,801 in cash; two real properties; and the interest in two businesses) is overwhelmingly disproportionate to the $100 million worth of drugs involved in the alleged conspiracy. Thus, there has been no showing that the civil forfeiture is punitive, rather than merely

compensation for the loss incurred by the Government in this case.

Third, and finally, the Bottones voluntarily agreed to the settlement of their civil claims. Not only does this factor distinguish the instant matter from the cases relied upon in defendants' moving papers, but having agreed to accept the forfeiture of certain assets in exchange for the release of certain others, the Bottones cannot now use this fact to obstruct a criminal prosecution on the underlying narcotics violations.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss the indictment on the grounds of double jeopardy is denied.

SO ORDERED.

s/s Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
February 25, 1993

(2)

Supreme Court, U.S
FILED
JAN 5 1994
OFFICE OF THE CLERK

No. 93-704

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED V. BOTTONE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a civil forfeiture action and a criminal indictment were properly regarded as parts of a single proceeding, for double jeopardy purposes, when both actions were commenced on the same day with arrest and seizure warrants issued by the same magistrate judge, the civil complaint incorporated the criminal indictment, and the properties involved in the settlement of the civil action included those named in the criminal forfeiture count of the indictment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 2 F.3d 17. The opinion of the district court denying a motion to dismiss the indictment (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. The petition for a writ of certiorari was filed on November 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose from an investigation by the Drug Enforcement Administration into a large-scale heroin distribution organization operating in New York City and Westchester County, New York. Pet. App. 7a; Gov't C.A. Br. 3. On July 30, 1991, a federal magistrate judge in the Southern District of New York issued arrest warrants for more than 40 individuals, including petitioners. The same magistrate judge issued seizure warrants on the same day for various assets alleged either to have facilitated narcotics trafficking or to constitute proceeds of the illegal activity, pursuant to civil forfeiture statutes, 18 U.S.C. 981 and 21 U.S.C. 881. Pet. App. 7a; Gov't C.A. Br. 3-4. Included in the assets seized under the civil forfeiture warrants was the "Auction Cars" used car business. Pet. App. 8a; Gov't C.A. Br. 4.

On August 14, 1991, an indictment was returned in the Southern District of New York charging petitioners and 33 others with, *inter alia*, conspiracy to distribute and to possess with intent to distribute "massive amounts of heroin," in violation of 21 U.S.C. 846. The indictment contained a criminal forfeiture count against petitioners and others, under 21 U.S.C. 853. Two days after the return of the indictment, on August 16, 1991, the federal district court issued a restraining order, pursuant to 21 U.S.C. 853(e)(1)(A), preventing various of the defendants, including petitioners, from transferring or dissipating the properties named in the criminal forfeiture count of the indictment. Pet. App. 8a-9a; Gov't C.A. Br. 5.

On October 2, 1991, at a pretrial conference, petitioners claimed that they lacked the funds necessary

to pay their attorneys' fees. Instead of filing a motion for release of some of the restrained assets, however, petitioners began settlement negotiations with the government concerning all the assets involved in the August 1 civil seizures and the August 16 restraining order. Pet. App. 9a.

Meanwhile, petitioner Alfred Bottone, Jr., filed an administrative claim challenging the seizure of Auction Cars. Pet. App. 9a; Gov't C.A. Br. 6. In response to that claim, the government on December 26, 1991, filed an *in rem* civil forfeiture complaint against Auction Cars and its assets. Only Alfred Bottone, Jr., appeared as a claimant in that action. Pet. App. 10a; Gov't C.A. Br. 6.

The negotiations regarding the release of assets for attorneys' fees resulted in a Stipulation and Order executed on January 20, 1993. In the Stipulation and Order, the government agreed to release $101,000 in cash as well as various other assets in order to enable petitioners to pay their attorneys' fees in the pending criminal case. In return, petitioners agreed to forfeit to the United States certain other properties, which included approximately $236,804 in bank deposits, two parcels of real estate, and interests in two businesses; they also agreed to renounce any claim to certain other properties. Pursuant to the Stipulation and Order, the government agreed to dismiss the civil forfeiture case. Pet. App. 11a; Gov't C.A. Br. 7.

2. On February 23, 1993, petitioners filed a motion to dismiss the indictment. Pet. App. 12a. Relying on this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), they argued that the settlement agreement constituted "punishment" within the meaning of the Double Jeopardy Clause and that a

criminal prosecution based on the same conduct was therefore barred.

The district court denied the motion. The court found that "the criminal case against the defendants and the simultaneous civil proceedings against their property constitute a single, coordinated prosecution for alleged violations of the federal narcotics laws." Pet. App. 30a. The district court also found that petitioners had failed to meet their burden of demonstrating that the value of the seized property was overwhelmingly disproportionate to the value of the controlled substances at issue in the case, so that it could not be said that the civil forfeiture was punitive, rather than merely compensatory. *Id.* at 31a. Finally, the district court noted that because petitioners had voluntarily agreed to the terms of the settlement of their civil claims, they could not "now use this fact to obstruct a criminal prosecution on the underlying narcotics violations." *Id.* at 32a.

3. The court of appeals affirmed. The court noted that this Court's decision in *Halper* established that a civil fine could constitute punishment within the meaning of the Double Jeopardy Clause if it was "overwhelmingly disproportionate" to the government's actual losses, but that this Court also made clear that its holding did not apply to multiple sanctions arising from a single proceeding. Pet. App. 14a-16a. Considering the circumstances of this case, the court of appeals agreed with the district court that "the civil and criminal actions were but different prongs of a single prosecution of [petitioners] by the government." Pet. App. 18a-19a. The court based its conclusion on several factors: (1) warrants for the civil seizures and criminal arrests were issued on the

same day by the same judge, based on the same affidavit; (2) the settlement agreement concerned both properties involved in the criminal proceeding and properties named in the criminal case; (3) the civil complaint incorporated the criminal indictment; and (4) petitioners were aware of the criminal charges against them when they entered the settlement agreement. Pet. App. 18a.[1]

ARGUMENT

Petitioners renew their contention (Pet. 14-23) that the Double Jeopardy Clause bars the criminal action against them, because they have already suffered "punishment" as a result of the settlement of their civil forfeiture claims. They argue that the court of appeals erred in finding that the civil and criminal actions in this case were all part of one proceeding against them for purposes of the Double Jeopaerdy Clause. That claim is without merit.

This Court stated explicitly in *United States* v. *Halper*, *supra*, that its decision did not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." 490

[1] Although the civil and criminal actions were filed separately and had different docket numbers, the court of appeals explained that separate treatment of the civil and criminal actions was simply the consequence of the different rules of procedure applicable to civil and criminal cases. The court found that it was clear from the simultaneous initiation of the cases (when the arrest and seizure warrants were issued) and the coordinated actions taken in the civil and criminal cases that the criminal prosecution and the civil forfeiture suit were in all material respects parts of a single proceeding against petitioners. Pet. App. 19a-20a.

U.S. at 450. The district court and the court of appeals correctly concluded, based on all the relevant circumstances, that the civil forfeiture action and the criminal indictment were parts of a single, concerted effort to prosecute petitioners for their criminal violations and to forfeit the proceeds of their alleged illegal activities. As the court of appeals noted, it was impossible procedurally to join the civil forfeiture action with the criminal indictment in a single suit with a single docket number. Pet. App. 19a. Everything else, however, pointed to a conclusion that the civil and criminal actions were part of a single proceeding against petitioners. Both the civil and the criminal aspects of the case were begun on the same day, when arrest warrants for the individuals and seizure warrants for the property were all issued by the same magistrate judge, based on the same affidavit. The civil complaint, filed four months after the indictment was returned (but well before trial), incorporated the indictment. And the property sought to be forfeited had already been seized pursuant to the warrants at the time the criminal complaint was filed. *Id.* at 18a; Gov't C.A. Br. 11-12, 15. What is more, the settlement agreement entered into by petitioners involved some properties that were the subject of the criminal indictment and others that were part of the civil action. It is thus clear that the civil and criminal actions were interrelated and constituted but different aspects of a single proceeding against petitioners and their property. Pet. App. 18a.

Petitioners cite *In re Bradley*, 318 U.S. 50 (1943), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), in support of their argument, but those cases are

inapposite. Both cases dealt with multiple punishments but had nothing to do with the question of what constitutes separate proceedings. Each case involved an erroneous sentence, because the court imposed both a fine and imprisonment when the applicable statute authorized only one or the other, but not both. In each case this Court held that the defendant's payment of the fine extinguished the court's power to amend the sentence to impose only imprisonment. Once the payment had been made, the defendant had suffered one of the alternative punishments the law authorized, and the court could not impose a second punishment without violating the Double Jeopardy Clause. In this case, it is not disputed that the government had the power to seek both criminal and civil penalties against petitioners, and that if the penalties were imposed as part of a single proceeding, the Double Jeopardy Clause would not be implicated.

Petitioners also claim a conflict with decisions from the Fifth Circuit in *United States* v. *Sanchez-Escareno*, 950 F.2d 193 (1991), cert. denied, 113 S. Ct. 123 (1992), and *United States* v. *Park*, 947 F.2d 130 (1991), modified on other grounds, 951 F.2d 634 (1992), but neither of those decisions is inconsistent with the decision in this case. In *Sanchez-Escareno*, the issue was not whether civil and criminal proceedings were separate, but whether an unpaid civil assessment that the government never sought to enforce could be considered "punishment" so as to bar a criminal prosecution. The defendants were assessed civil penalties when they entered the United States with drugs in their cars, and they signed promissory notes agreeing to pay the fines to the United States. But no civil actions to enforce the notes were ever

instituted; instead the government chose to proceed with criminal prosecutions. The court of appeals held that because the defendants had never made any payment on the notes, and no judgments were ever entered requiring payment, the defendants had not been "punished" within the meaning of the Double Jeopardy Clause. 950 F.2d at 201-203. No question of single or separate proceedings was before the court; the only question that the court addressed was whether the notes by themselves, in the absence of any payment or judgment, could be considered punishment.

In *United States* v. *Park*, *supra*, the court also held only that no civil penalty had been imposed. When the defendant failed to declare $48,000 in currency as he boarded a flight leaving the country, the currency was seized and held by Customs officials. The defendant was later charged with and convicted of criminal violations of currency reporting requirements. Civil forfeiture proceedings were not instituted, but were held in abeyance pending the outcome of the criminal prosecution. 947 F.2d at 135. In those circumstances, the court of appeals held that no civil penalty had been imposed and hence that there was no double jeopardy bar to his criminal conviction. 947 F.2d at 134-135. Again, because no civil proceeding had been instituted, the court had no occasion to address the question whether the civil and criminal actions could be considered part of a single proceeding.[2]

[2] It is also significant that petitioners had knowledge of the criminal charges against them when they voluntarily agreed to a settlement of the civil forfeiture action. Although the court of appeals did not address that aspect of the district court's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

JANUARY 1994

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analysis, those circumstances should be deemed to give rise to a waiver of any double jeopardy claim. See *United States* v. *Marcus Schloss & Co.*, 724 F. Supp. 1123, 1127 (S.D.N.Y. 1989).